

An Amendment to Utah's Criminal Code Covering Sexual Penetration Without Affirmative Consent: A Legislative Proposal and Justifications



Presentation by

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Sexual Violence is Widespread

Utah Commission on Criminal and Juvenile Justice (CCJJ):

- Among adult Utah women surveyed, about one in three (28.9%) reported being sexually assaulted during their lifetimes.
- Rape is the only Violent Crime Index Offense for which Utah's rate rises above the national average.

-- Christine Mitchell & Benjamin Peterson, 2007 RAPE IN UTAH SURVEY (2008).

Rape Rates in Utah are Above National Average

Utah's rape statistics **exceed the national average and are increasing over time.**

Year	Utah*	National*
2016	49.8	40.4
2017	54.7	41.7
2018	55.5	42.6
2019	56.8	42.6

*per 100,000

U.S. Dep't of Justice, Federal Bureau of Investigation, *2016 Crime in the United States, Violent Crime, Rape* (table 2); *2018 Crime in the United States by State* (table 5).

Cost of Rape in Utah

“Sexual violence cost Utah an estimated \$4.9 billion in one year... This equates to almost \$1,700 per Utah resident. The largest amount of sexual violence costs is from loss of quality of life and its related pain and suffering (as valued by the legal system)”

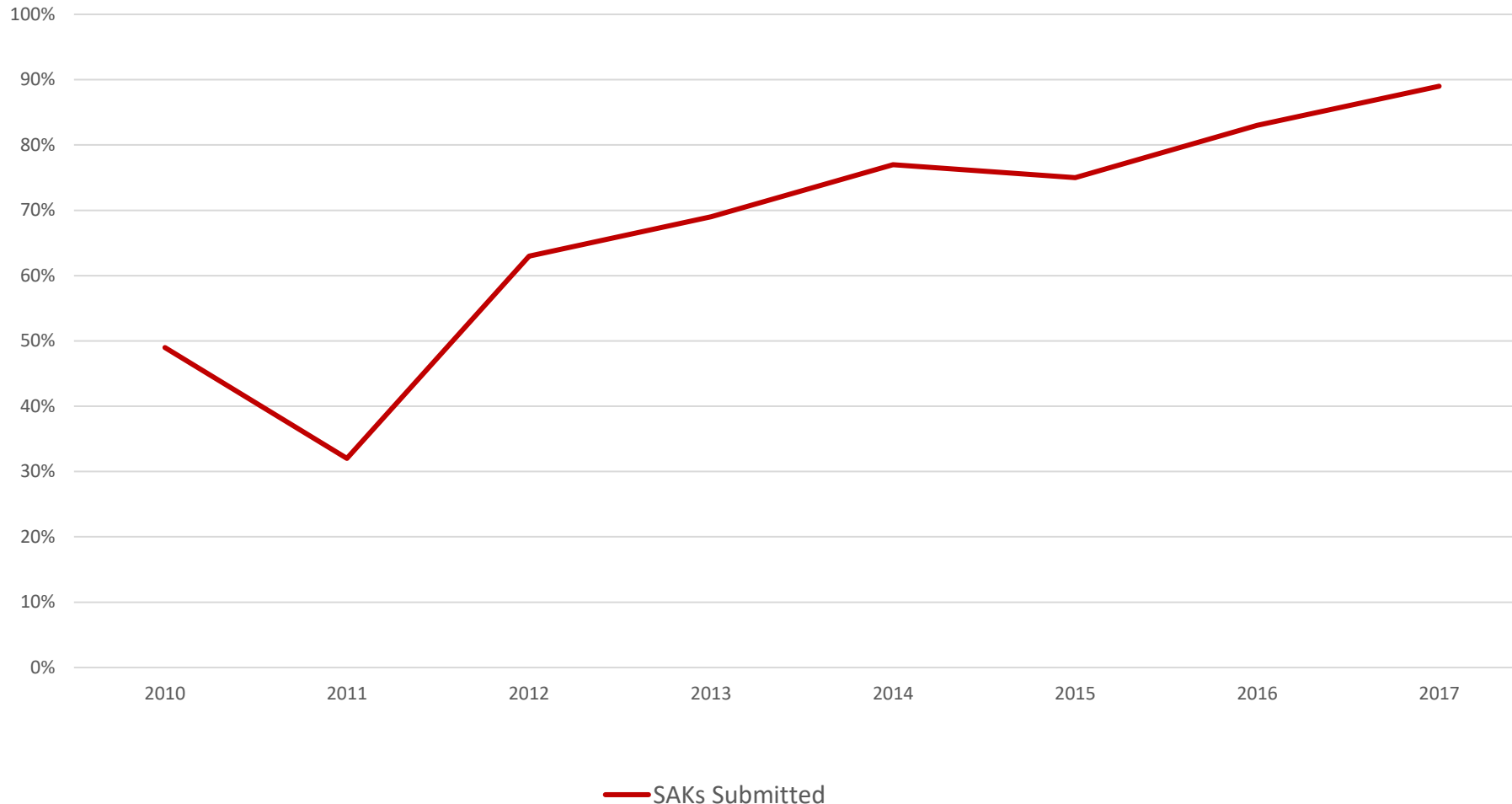
Costs of Sexual Violence in Utah. Utah Department of Health. 2011.

Individual Costs:

- Increased rates of:
 - PTSD
 - Depression
 - Anxiety
 - Eating disorders
 - Substance abuse
 - Suicide
 - Chronic health problems

Valentine et al., (2019). Victim Impact & Recovery, Chapter 9. *Medical Response to Sexual Assault*.

SAKs Submitted & Successfully Prosecuted Cases



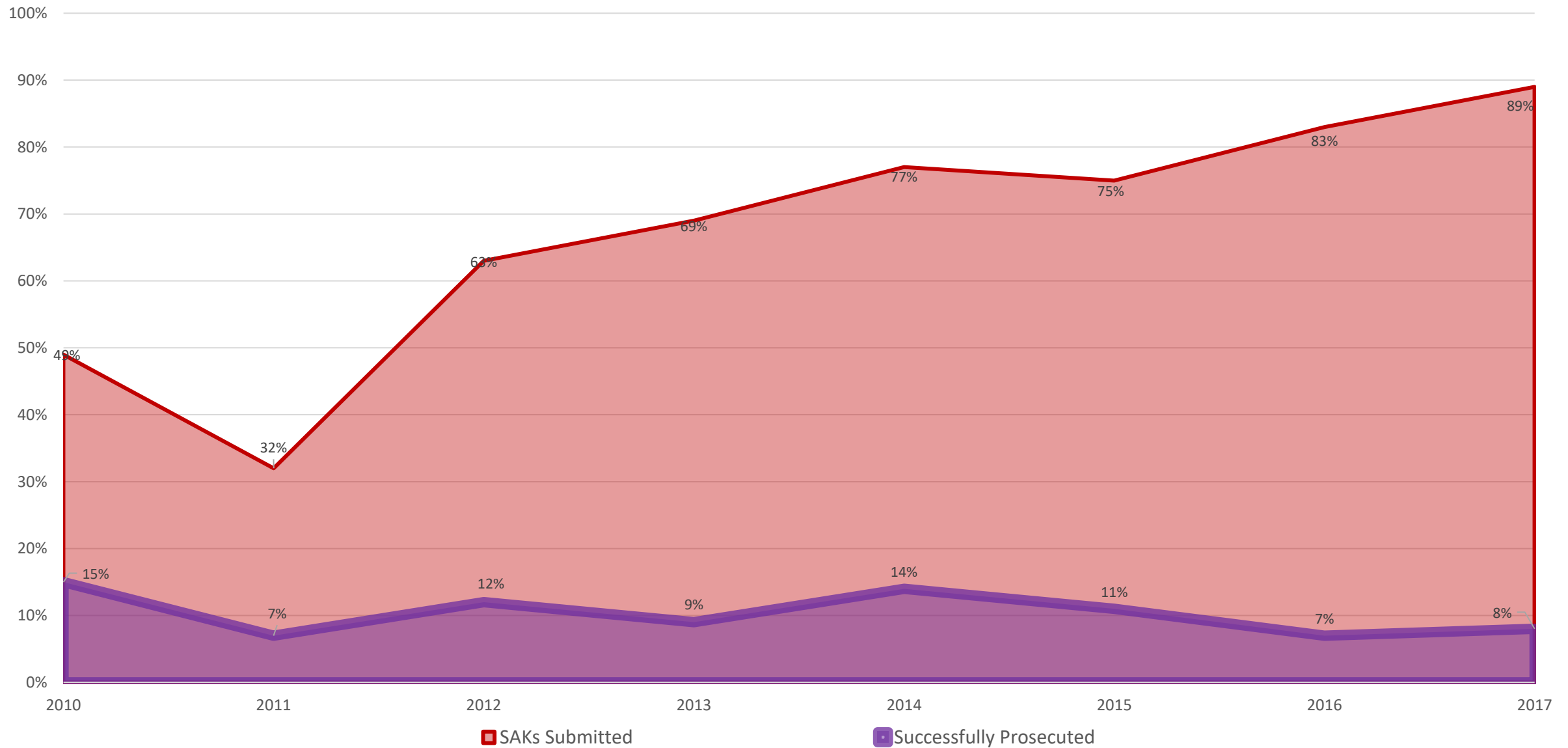
National Institute of Justice
Toolkit 2020,
New Research

Cases included:

- >18 years
- Fully collected sexual assault kit
- Victim wanted to prosecute
- Valentine, J.L., & Miles, L. (2020)

“The whole entire nation ought to be paying attention to what’s happening right here in Utah today,” Rep. Eric Hutchings, R-Kearns, said, “because this is a big deal.” Salt Lake Tribune, September 10, 2020.

SAKs Submitted & Successfully Prosecuted Cases



Utah's Rape Law Requires Proof of Non-Consent

- 1st degree felony rape is defined as “sexual intercourse with another person without the victim’s consent.” Utah Code § 76-5-402(1).
- Intercourse is without consent where “the victim expresses lack of consent through words or conduct.” Utah Code § 76-4-406(2).

Requirement of Non-Consent

- “[T]he crime of rape requires proof not only that a defendant ‘knowingly, intentionally, or recklessly had sexual intercourse,’ but also that he had the requisite mens rea as to the victim's nonconsent.” *State v. Barela*, 2015 UT 22, ¶ 26.
- “The [jury] instructions were erroneous because they implied that the State had to prove only that K.M. did not consent to sexual intercourse rather than prove that Mr. Barela had the requisite mens rea as to the victim’s lack of consent. In other words, the instructions did not convey the requirement that the State prove Mr. Barela’s intentional, knowing, or reckless state of mind regarding the absence of K.M.’s consent.” *State v. Barela*, 2015 UT 22, ¶ 51 (Durham, J., dissenting on other grounds).

The Gap in Current Utah Law

- The current Utah criminal code allows individuals to escape criminal liability for sexual penetration where the victim is not consenting by the expedient of **avoiding awareness** (or avoiding leaving proof of awareness) of the victim's non-consent.
- Examples of the gap:
 - A perpetrator inebriates a victim so that she is unable to provide consent and the prosecution is unable to prove the perpetrator knew (or was reckless) about non-consent.
 - A perpetrator swiftly demands sexual intercourse and the victim “freezes” due to fear.
 - A perpetrator sexually penetrates a victim while the victim is sleeping and creates a doubt about whether he knew (or was reckless) about non-consent.

Scope

Utah rape cases (2010-2019; N=6,688 cases)

Victims report (Valentine & Miles, 2020):

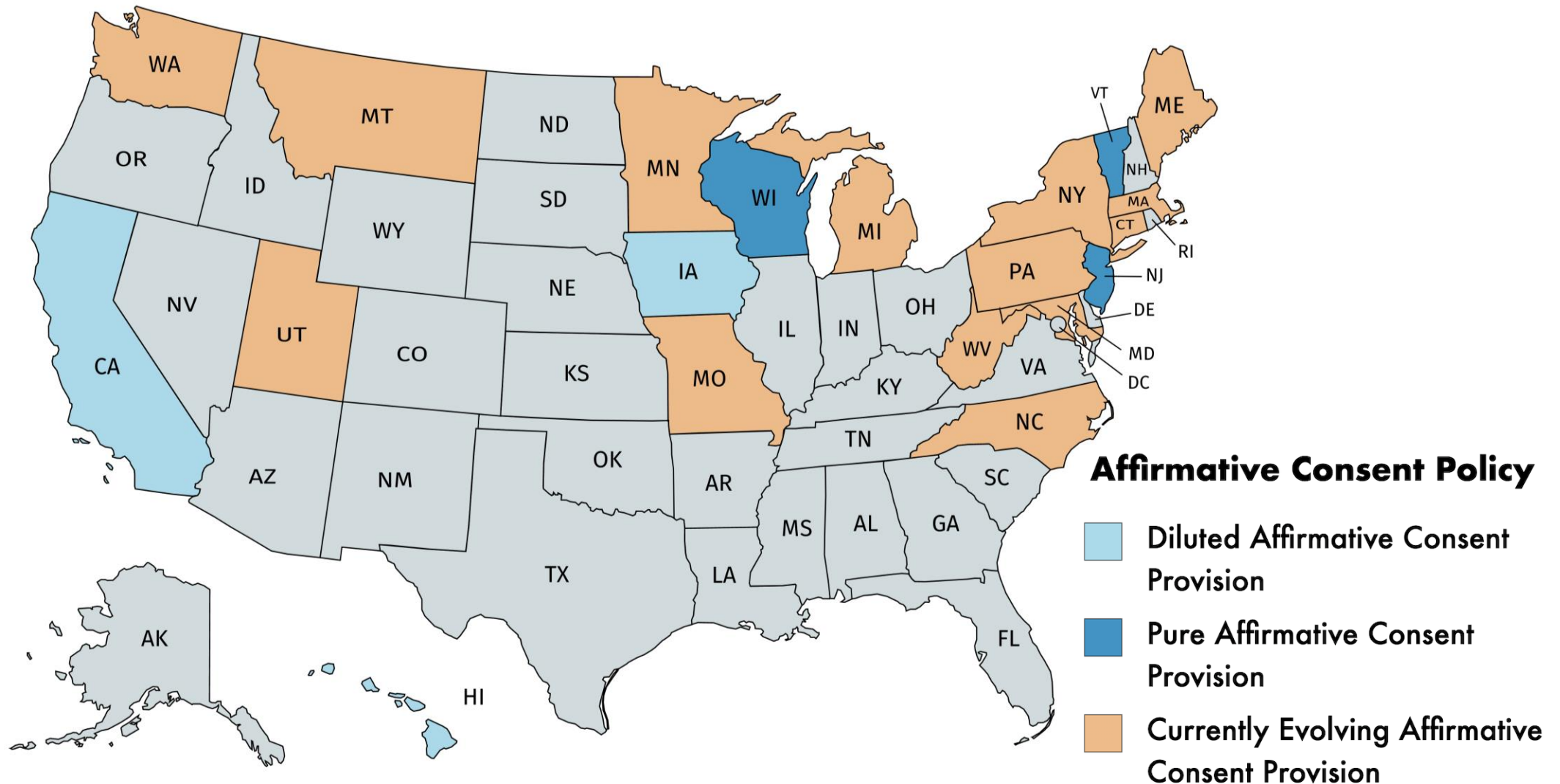
- 49% report loss of awareness or consciousness
 - 41% report alcohol use before assault
 - 16% suspected drug-facilitated
 - 15% strangled
 - 14% asleep and awakened to rape
-
- 70% of victims report tonic immobility (Rape Freeze Syndrome)

Moller et al., 2017

Affirmative Consent Should be the Standard

- Aims to protect (among others) intoxicated, fearful, and sleeping victims.
- “A victim who is unconscious, sleeping, or immobilized by fright does not consent to intercourse simply by virtue of not resisting.” - Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441 (2016)

Justification



Definition of Consent in US Military

- "Consent" is defined as words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. There is no consent where the person is sleeping or incapacitated, such as due to alcohol or drugs, or mental incapacity. There is no consent when the person is under legal age.

-Department of Defense 2019 Annual Report on Sexual Assault in the Military

Example: Wisconsin's Affirmative Consent Law

(3) THIRD DEGREE SEXUAL ASSAULT.

(a) Whoever has sexual intercourse with a person without the *consent* of that person is guilty of a Class G felony.

(b) Whoever has sexual contact in the manner [as defined] with a person without the consent of that person is guilty of a Class G felony.

(4) CONSENT. "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.

- Wisc. Stat. § 940.225.(3) & (4) (first enacted in 1975 and amended several times thereafter")

Wisconsin's Law Successfully Implemented

The plain language of [the affirmative consent statute] requires the state to prove beyond a reasonable doubt that the defendants attempted to have sexual intercourse with the victim *without the victim's words or overt actions* indicating a freely given agreement to have sexual intercourse. **The state does not have to prove that the victim withheld consent.**

State v. Grunke, 2008 WI 82 (emphasis added).

“If gaps exist in your code that allow offenders to avoid culpability because they can capitalize on normal victim trauma responses, this proposal represents a path to closing that gap.” – Miriam S. Falk, Asst. Attorney General, Wisconsin Department of Justice

Current Rape Statistics (per 100,000)

Year	Utah	Wisconsin	National
2016	49.8	34.2	40.4
2017	54.7	36.9	41.7
2018	55.5	38.7	42.6
2019	56.8	38.8	42.6

U.S. Dep't of Justice, Federal Bureau of Investigation, *2016, 2017, 2018, 2019 Crime in the United States by State*(table 5).

Wisconsin's Law Successfully Implemented

"Affirmative consent definitions transform the legal meaning of passivity. Absent some indication of consent, verbal or non-verbal, an alleged victim is deemed *not* to have consented. To be clear, in an affirmative consent jurisdiction, the burden of proving guilt beyond a reasonable doubt remains on the state. In order to convict, the prosecution must demonstrate that the defendant engaged in intercourse without the alleged victim's consent, which must be manifested in an affirmative manner.

Several longstanding examples illustrate how affirmative consent definitions operate. In Wisconsin, which first enacted its statute in 1975, consent 'means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.'"

-Deborah Tuerkheimer Letter of Endorsement

(Proposed) Utah Code § 76-5-406.1 -Sexual Penetration Without Consent

- (1) A person commits Sexual Penetration Without Consent when the actor has sexual intercourse with another person or causes the penetration by body part, however slight, of the genital or anal opening of another person for purposes of sexual gratification, without words or overt actions by the person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual penetration.
- (2) Criminal responsibility is established if the defendant has acted with intent, with knowledge, or recklessly with respect to the elements specified in subsection (1).
- (3) Consent to any sexual act or prior consensual activity between or with any party does not necessarily constitute consent to any other sexual act. Consent may be initially given but may be withdrawn through words or conduct at any prior to or during sexual activity.
- (4) A violation of this section is a separate offense and is not a lesser included offense of any other section.

Wisconsin Law Compared With Proposed Utah Law

Wisconsin

Whoever has sexual intercourse with a person without the *consent* of that person is guilty of a Class G felony. ... "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact.

- Wisc. Stat. § 940.225.(3)

Utah

A person commits Sexual Penetration Without Consent when the actor has sexual intercourse with another person ... without words or overt actions by the person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual penetration. [Third Degree Felony]

- Utah Code § 76-5-406.1 (proposed)

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- (4) A violation of this section is a separate offense and is not a lesser included offense of any other section.

Accountability

Utah Code § 76-5-406.1 -Sexual Penetration Without Consent:

- Third-Degree Felony
- Registerable Sex Offense

Jane Doe Case

Jane Doe 1 went to visit a friend with whom she had been corresponding for a while. They knew each other from high school, and she thought it would be fun to visit and see the university campus where he attended school. While there, she was pressured to drink excessively and unfortunately experimented for the first time with drugs, which her “friend” provided her. She soon became barely conscious and only had short memories, but at one point her host was forcing her mouth on his penis and she could not breathe. During another flash of consciousness, the perpetrator’s roommate was raping her from behind while the perpetrator continued to force his penis in her mouth. When she woke up the next morning and asked him what in the world happened, he assured her that “it was your idea” and “you were totally into it.” There was no way, after heavy drinking and experimenting with new drugs, that she had any capacity to understand what she was doing, much less consent to it. Charges were not filed because the State assumed that the jury would judge Jane Doe 1 for using alcohol and drugs and the perpetrator insisted that she consented, and **there was no way to prosecute him absent a clear mens rea amounting to rape.**

Current Endorsements

- SWAP: Statewide Association of Prosecutors and Public Attorneys
- RCC: Recovery Rape Center
- Professor Deborah Tuerkheimer (Northwestern Law School)
- Utah Crime Victim's Legal Clinic

Questions?

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